11-13-2002

Second Place

Kimberly Owens

Leah Scholer

SECOND PLACE

IN THE

UNITED STATES SUPREME COURT

CONNECTICUT DEPARTMENT OF PUBLIC SAFETY On behalf of Henry C. Lee, Commissioner, Office of Adult Probation, on behalf of Robert Bosco, Director, John Armstrong, Commissioner, Petitioners, v. JOHN DOE, Individually and on behalf of others similarly situated; SAMUEL POE, Individually and on behalf of others similarly situated, Respondents.	Case No. 01-1231
RONALD O. OTTE, Commissioner, Alaska Department of Public Safety; BRUCE M. BOTELHO, Alaska Attorney General, Petitioners, v. JOHN DOE I, JANE DOE, and JOHN DOE II, Respondents.	Case No. 01-0729

PETITIONERS' BRIEF

Round # 1: 3:40 p.m.
November 13, 2002

Kimberly Owens
Leah Scholer
200 McAllister Street
San Francisco, California 94102
(415) 565-4600

Counsel for Petitioners

QUESTIONS PRESENTED

1. Does the Connecticut sex offender registration act, which discloses true and accurate public criminal history information to allow the public to monitor their children's interactions with neighbor sex offenders, comply with due process where the sex offenders' underlying offenses, and not an act by Connecticut, cause the new set of registration duties?

2. Does the Alaska sex offender registration act, a law that allows the state to passively disclose true information to concerned citizens, fall outside the scope of the ex post facto prohibition because the legislature intended it to help protect Alaska citizens and because it requires sex offenders to simply register with local authorities, and in no manner punishes, disables, or restrains them?

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

CASES — Page

UNITED STATES SUPREME COURT

TABLE OF AUTHORITIES
(continued)

CASES — Page

UNITED STATES COURT OF APPEALS

TABLE OF AUTHORITIES
(continued)

CASES — Page

UNITED STATES DISTRICT COURT

STATE COURT

CONSTITUTIONAL PROVISION

FEDERAL STATUTE

STATE STATUTES

TABLE OF AUTHORITIES
(continued)

STATE STATUTES — Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

OTHER AUTHORITIES — Page

IN THE

UNITED STATES SUPREME COURT

CONNECTICUT DEPARTMENT OF PUBLIC SAFETY On behalf of Henry C. Lee, Commissioner, Office of Adult Probation, on behalf of Robert Bosco, Director, John Armstrong, Commissioner, Petitioners, v. JOHN DOE, Individually and on behalf of others similarly situated; SAMUEL POE, Individually and on behalf of others similarly situated, Respondents.	Case No. 01-1231
RONALD O. OTTE, Commissioner, Alaska Department of Public Safety; BRUCE M. BOTELHO, Alaska Attorney General, Petitioners, v. JOHN DOE I, JANE DOE, and JOHN DOE II, Respondents.	Case No. 01-0729

PETITIONERS' BRIEF

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully submit this brief and request that this Court REVERSE the judgment of the United States Court of Appeals for the Second Circuit on the due process claim, and REVERSE the judgment of the United States Court of Appeals for the Ninth Circuit on the ex post facto claim.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit appears at 271 F.3d 38 (2d Cir. 2001). The opinion of the United States Court of Appeals for the Ninth Circuit appears at 259 F.3d 979 (9th Cir. 2001).

STANDARD OF REVIEW

This Court reviews de novo questions of law. *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

STATEMENT OF THE CASE

Preliminary Statement

1. Connecticut Sex Offenders' Due Process Claim.

On February 22, 1999, John Doe filed suit under 42 U.S.C. § 1983 in the United States District Court for the District of Connecticut. (Joint Appendix ("J.A.") 84.) Doe alleged that the Connecticut Sex Offender Registry Act ("CT-SORA") violated the Due Process and the Ex Post Facto Clauses of the United States Constitution. (J.A. 84.) Doe sought declaratory and injunctive relief for himself and a class of others similarly situated. (J.A. 84.) Doe moved for summary judgment on the due process claim on July 9, 1999. (J.A. 85.) The defendants, Connecticut agencies and employees responsible for administering the CT-SORA, cross-moved for summary judgment. (J.A. 85.)

On March 31, 2001, the district court granted summary judgment to Doe on the due process claim and to the defendants on the ex post facto claim. (J.A. 85.) On April 18, 2001, Doe filed motions for certification of the due process claim class, for a declaratory judgment, and for injunctive relief. (J.A. 85.)

The district court issued a permanent injunction on May 17, 2001, which enjoined the Connecticut Department of Public Safety ("CDPS") from disclosing information to the public from the sex offender registry, and required the CDPS to take down the registry website. (J.A. 85.) On May 18, 2001, the district court certified the due process class, and issued a declaratory judgment in favor of the class on the due process claim. (J.A. 59-60.) The defendants moved for a stay of the injunction, which the district court denied on May 18, 2001, and the United States Court of Appeals for the Second Circuit denied on June 5, 2001. (J.A. 85.) The defendants appealed to the United States Court of Appeals for the Second Circuit. (J.A. 73.)

On October 19, 2001, the United States Court of Appeals for the Second Circuit affirmed the judgment of the district court. (J.A. 97.) After holding that the CT-SORA violated the Due Process Clause, the court declined to address the ex post facto claim. (J.A. 96-97.) This Court granted certiorari on May 20, 2002. *Conn. Dept. of Pub. Safety v. Doe*, 122 S. Ct. 1959 (2002).

2. Alaska Sex Offenders' Ex Post Facto Claim.

John Doe I and Doe II ("Doe I and II") are convicted sex offenders who reside in Alaska. (J.A. 111.) They initiated a 42 U.S.C. § 1983 action and challenged the constitutionality of the Alaska Sex Offender Registration Act ("ASORA"), which the legislature enacted in 1994. (J.A. 111.) Doe I and II moved for a preliminary injunction to stop Alaska from collecting and disclosing sex offender information under ASORA. *Rowe v. Burton*, 884 F. Supp. 1372, 1375 (D. Alaska 1994). In addition, they moved for allowance to proceed under pseudonyms. *Id.* The district court required Doe I and II to register under ASORA but prohibited the state from publicly disclosing the personal information. *Id.* at 1388. The court denied the use of pseudonyms. *Id.*

Doe I and II appealed the denial of their use of pseudonyms, and the United States Court of Appeals for the Ninth Circuit dismissed the appeal for lack of a final judgment. (J.A. 200.) The district court dismissed the remanded complaint because Doe I and II refused to amend in their real names. (J.A. 200.) The court of appeals reversed the decision and allowed Doe I and II to continue with pseudonyms. (J.A. 201.)

In 1998, Doe I and II moved for summary judgment on all of their claims that ASORA violated federal and state constitutional rights. (J.A. 143, 144.) State defendants Ronald Otte, commissioner of the Alaska Department of Public Safety, and Bruce Botelho, Alaska's attorney general, moved for partial summary judgment on, inter alia, Doe I and II's claim that ASORA is an ex post facto law. (J.A. 139, 144.) The district court granted defendants' motion for summary judgment on the ex post facto claim and denied Doe I and II's cross-motion for summary judgment on the same. (J.A. 185.) The district court dismissed Doe I and II's claims that ASORA violated their federal due process rights. (J.A. 185.)

Doe I and II amended the complaint and moved for summary judgment on the claim that ASORA violates their due process rights. (J.A. 187.) The district court granted defendants' cross-motion for summary judgment and dismissed Doe I and II's complaint on the alleged due process violation. (J.A. 191.) The district court granted an injunction to keep Doe I and II's registry information out of public records until the Ninth Circuit Court of Appeals ruled on the case. (J.A. 194.)

The Ninth Circuit Court of Appeals, in 2001, held that ASORA violated the Ex Post Facto Clause. (J.A. 222.) This Court granted certiorari. *Otte v. Doe*, 534 U.S. 1126 (2002).

Statement of Facts

1. The Origin of Sexual Offender Registration Acts.

In 1989, a masked man kidnapped eleven-year-old Jacob Wetterling near his home in St. Joseph, Minnesota. (J.A. 82.) Jacob's family never saw him again. (J.A. 82.) In response to this tragedy, the federal government enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("the Wetterling Act") in September of 1994. Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 Buff. Crim. L. Rev. 593, 598 (2000). The Wetterling Act designates the minimum standards for state registration acts. *Id.* The Wetterling Act requires states to register offenders convicted of a criminal offense against a minor or a sexually violent offense. 42 U.S.C. § 14071(a)(1)(A) (2002). At a minimum, the Wetterling Act requires states to obtain sex offenders' names, addresses, fingerprints, and photographs. *Id.* § 14071(b). The states may disclose the registry information for any purpose state law permits, and must disclose information necessary to protect the public. *Id.* § 14071(e). Additionally, states are free to broaden the list of offense categories, lengthen the mandated registration period, or impose more stringent measures designed to respond to each state's individual needs. Logan, 3 Buff. Crim. L. Rev. at 600. The federal government amended the Wetterling Act in 1996 and inserted the Pam Lyncher Sexual Offender Tracking and Identification Act, which required the states to impose lifetime registration on certain offenders. *Id.*

On July 29, 1994, Jesse Timmendequas, a sexual offender with two prior convictions, sexually assaulted and murdered seven-year-old Megan Kanka. Ralph Siegel, *Suspect Admits Killing Girl*, 7 Record A1 (Aug. 2, 1994). Timmendequas invited Megan into his home, and subsequently sexually assaulted and murdered her. *Id.* Megan's parents had no way of knowing

that not just one, but three convicted sexual offenders lived just across the street. Siegel, 7 Record at A1. New Jersey passed legislation as a result of the outrage when residents discovered that the state allowed convicted sexual offenders to live anonymously in their communities. (J.A. 81.) The legislation, coined "Megan's Law," required public officials to alert the public of convicted sexual offenders who lived in their communities. Subsequently, every state adopted a version of "Megan's Law." (J.A. 81.)

2. Connecticut's Sexual Offender Registration Act.

Connecticut's version of "Megan's Law," the CT-SORA, requires people convicted of specified offenses to register with the CDPS after their release into the community. (J.A. 81.) The CT-SORA mandates registration of people convicted of (1) criminal offenses against a victim who is a minor, (2) nonviolent sexual offenses, (3) sexually violent offenses, and (4) felonies committed for a sexual purpose. (J.A. 81.) The registration period varies depending upon the type of offense. (J.A. 82.) A person convicted of a criminal offense against a minor or a nonviolent sexual offense must register for ten years. (J.A. 82.) The sentencing court also has discretion to require a person convicted of a felony committed for a sexual purpose to register for ten years. (J.A. 82.) A person convicted of a sexually violent offense must register for life. (J.A. 82.) The CDPS has a procedure to respond to challenges to the accuracy of the registry information. (J.A. 30.)

Pursuant to the CT-SORA, the CDPS accumulates the information on sex offenders, and distributes it to local police departments, state police troops, and the Federal Bureau of Investigations. (J.A. 83.) The information is also available to all members of the public at the CDPS during business hours. (J.A. 83.) To effectively disseminate the information to members of the public who live in the sex offenders' communities, Connecticut disclosed the information

through a website. (J.A. 83.) A statement on the website explained that the website's purpose was to "facilitate access to publicly-available information about persons convicted of sexual offenses." (J.A. 83.) The website also stated that Connecticut had not determined that any individual listed in the registry was currently dangerous. (J.A. 83.)

3. The Connecticut Respondents.

John Doe is a Connecticut resident who committed an offense specified in the CT-SORA. (J.A. 84.) Doe does not contend that any of his personal data listed in the CT-SORA is inaccurate. (J.A. 32.) Doe represents a certified class of all sex offenders who must register pursuant to the CT-SORA. (J.A. 84.)

4. Alaska's Sexual Offender Registration Act.

In 1994, the state legislature passed the Alaska Sex Offender Registration Act, which requires convicted sex offenders to submit personal information for addition to a state sex offender registry available to law enforcement agencies and the public. (J.A. 212.) The legislature that passed the act faced a crisis: the nation's highest rates of child sexual abuse. (J.A. 213.) One-fourth of Alaska's prison inmates had committed sexual offenses, and 100 sex offenders earned release into the community in 1993. (J.A. 212.)

The legislative findings at the beginning of ASORA declare that:

> (1) sex offenders pose a high risk of re-offending after release from custody;
> (2) protecting the public from sex offenders is a primary government interest;
> (3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and
> (4) release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety.

Alaska H. 69, 18th Leg., 2d Sess. § 1 (May 12, 1994). ASORA requires a sex offender to complete a form with the offender's name, address, place of employment, and other identifying information. Alaska Stat. § 12.63.010(b)(1) (2001). In addition, the local police authority

fingerprints and photographs the sex offender upon initial registration. Alaska Stat. § 12.63.010(b)(2).

Sex offenders convicted of aggravated or two or more sex offenses remain subject to the registration requirements for life, and verify registration information four times a year. Alaska Stat. §§ 12.63.010(d)(2), 12.63.020(a)(1). Sex offenders convicted of a single sex offense or kidnapping register annually for 15 years. Alaska Stat. §§ 12.63.010(d)(1), 12.63.020(a)(2).

Alaska makes the information collected under ASORA available to law enforcement agencies and the public via the Internet. (J.A. 214.) The website provides visitors with the search tools to access an offender's name, photograph, physical description, address, place of employment, and conviction information. (J.A. 214.)

5. The Alaska Respondents.

In 1985, Doe I plead nolo contendere to sexual abuse of a minor. (J.A. 212.) Doe I's victim was his daughter, whom he abused while she was between the ages of nine and eleven. (J.A. 212.) Released from prison in 1990, Doe I received custody of his daughter after he convinced the court that his rehabilitation was successful. (J.A. 212.)

Doe II plead nolo contendere to sexual abuse of a minor in 1984. (J.A. 213.) His victim was 14 years old. (J.A. 213.) Doe II served eight years in prison and gained release in 1990. (J.A. 213.)

SUMMARY OF ARGUMENT

The CT-SORA complies with the Due Process Clause because Connecticut did not defame the sex offenders and did not alter their legal status when it disclosed their true criminal histories. To establish a liberty deprivation based on injury to reputation, the sex offenders must

prove that Connecticut defamed them, and that this defamation altered or extinguished a right or status previously recognized by state law. *Paul v. Davis*, 424 U.S. 693, 701 (1976). Connecticut did not defame the sex offenders because it disclosed only true and accurate public information of the sex offenders' criminal histories. The Connecticut website did not imply that any particular individual was currently dangerous because the group of sex offenders was large. Connecticut only listed individuals in the registry that a criminal court convicted of a sex offense. Connecticut disclosed the privileged criminal history data to protect the public.

Additionally, the alleged state action did not alter or impair the sex offenders' legal status or benefits. The underlying offenses that the sex offenders committed, not a defamatory act by Connecticut, subjected them to the duty to register. The alleged plus factor, the duty to register, did not occur in the course of the alleged defamation as this Court requires. Connecticut has the power to impose affirmative duties that relate to public safety, which is a legitimate legislative objective. The registration duties do not constitute the plus factor required by this Court to establish a protected liberty interest.

Finally, the circumstances do not warrant additional procedural safeguards. Connecticut has compelling interests to protect the public and conserve scarce fiscal resources. An additional hearing would serve no purpose because sex offenders have a high rate of recidivism, and it is impossible to predict who will re-offend. Members of the public have a right to receive information that will permit them to safeguard their children. States do not have the resources to conduct individual assessments of each offender's risk of re-offense. These factors evidence that this Court should not require a hearing.

Similar to the CT-SORA, ASORA simply collects and discloses public information, without punishing sex offenders. Therefore, ASORA falls outside the ex post facto prohibition

of the Constitution. The Alaska legislature enacted ASORA in order to help the public protect itself and to help the police apprehend crimes, both of which are civil goals. In addition, the statute's effect is regulatory, and not so punitive as to negate the civil intent of the legislature. Specifically, ASORA does not disable or restrain sex offenders. Also, the state's role to disclose public information is not traditionally viewed as punishment. In addition, ASORA does not promote retribution or deterrence, but instead rationally relates to the non-punitive purpose of protecting the public. When taken in the context of the daunting problem of recidivism among sex offenders and the statute's purpose to protect people, the ASORA features are not excessive. Any evidence of punitive effects measures far below the clearest proof required to override the legislature's civil intent.

ARGUMENT

I. THE CONNECTICUT SEXUAL OFFENDER REGISTRATION ACT COMPLIES WITH DUE PROCESS BECAUSE CONNECTICUT DISCLOSES ONLY TRUE AND ACCURATE INFORMATION, WHICH DOES NOT ALTER OR IMPAIR THE SEX OFFENDERS' LEGAL STATUS.

Connecticut posts true and accurate information on the Internet regarding the sex offenders' criminal histories. This accurate information does not impair or alter the sex offenders' legal status, but merely offers the public easier access to already public information.

The Fourteenth Amendment's concept of liberty does not protect a person's reputation alone. *Paul v. Davis*, 424 U.S. 693, 701 (1976). To prevail on the due process claim, the sex offenders must prove (1) that Connecticut defamed them, and (2) that "as a result of the state action complained of," Connecticut altered or extinguished a right or status previously recognized by state law. *Id.* at 712. Lower courts that apply the test from *Paul v. Davis* refer to it as the "stigma-plus" test or the "defamation-plus" test because the first prong requires proof of

the elements of defamation. *WMX Techs. Inc. v. Miller*, 80 F.3d 1315, 1319 (9th Cir. 1996); *Herb Hallman Chevrolet, Inc. v. Nash-Holmes*, 169 F.3d 636, 645 n. 3 (9th Cir. 1999).

A. Connecticut did not defame the sex offenders as required by the defamation prong of the *Paul v. Davis* test when it disclosed true criminal histories to the public.

The sex offenders must prove that Connecticut defamed them when it disclosed their convictions to the public. *Paul*, 424 U.S. at 708–09; *Siegert v. Gilley*, 500 U.S. 226, 233 (1991). Connecticut did not defame the sex offenders because it disclosed only true information, which it had privilege to disclose. Connecticut was not negligent when it determined the criminal history data was true because a criminal court convicted all of the sex offenders. The Respondents are unable to prove all of the elements of defamation. *See Restatement (Second) of Torts* § 558 (1977) (providing the elements of defamation: (1) false statement about another person, (2) published without privilege, (3) fault of at least negligence by the publisher, and (4) actionable without special harm or the existence of special harm).

1. Connecticut did not defame the sex offenders because it disclosed only true and accurate information that was already available to the public.

The CT-SORA website allows the public easier access to public information regarding sex offenders' criminal histories. (J.A. 83.) The stated purpose of the website was to "facilitate access to publicly-available information about persons convicted of sexual offenses." (J.A. 83.) As part of Connecticut's Freedom of Information Act, even information regarding arrests is public information. Conn. Gen. Stat. § 1-215(a) (2001) ("[A]ny record of the arrest of any person . . . shall be a public record from the time of such arrest."). This Court has struck down statutes in the past that kept the truth from the public. *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (criticizing a state law that prohibited certain truthful advertising as "highly paternalistic").

An individual who publishes a true statement is not liable for defamation. *Restatement (Second) of Torts* § 581A. Specifically, section 581A(c) of the Restatement (Second) of Torts states that "[i]f the defamatory statement is a specific allegation of the commission of a particular crime, the statement is true if the plaintiff did commit that crime." *Id.* § 581A(c). A statement that an individual committed a specific crime is not defamatory if the individual did commit that crime. *Id.*

The Connecticut sex offender registry website correctly stated that the listed individuals committed sexual offenses. (J.A. 83.) The first page of the website emphasized that Connecticut included offenders in the registry "solely by virtue of their conviction record." (J.A. 83.) The sex offenders listed in the registry plead guilty, plead nolo contendere, or a jury or court found them guilty of a sex and/or violent offense in a criminal proceeding. Conn. Gen. Stat. § 54-250 (2001). All of this information was a matter of public record. (J.A. 83.) The statement accurately portrayed the sex offenders' criminal histories because all of the individuals actually committed the crimes according to the standards of the U.S. criminal justice system.

The case law of this Court also recognizes that a state violates due process only where it is possible that the information disclosed is false. In *Wisconsin v. Constantineau*, the unconstitutional Wisconsin statute allowed the chief of police to post a notice in liquor stores that forbade the sale of alcohol to certain individuals who became dangerous after consuming alcohol. 400 U.S. 433, 434–35 (1971). The chief of police alone decided which individuals to include in the notice. *Id.* This Court expressed fear that without any sort of prior hearing the individual "may have been the victim of an official's caprice" and for this reason, held that the statute violated the Due Process Clause. *Id.* at 437. Wisconsin had to hold a hearing to determine the truth of the charges prior to posting individuals' names. *Id.* This Court requires a

hearing when the public actor is uncertain of the truth of the information. *See e.g. Goss v. Lopez*, 419 U.S. 565, 581 (1975) (requiring public schools to hold a hearing prior to suspending students from school to determine if the misconduct charges are true); *Bell v. Burson*, 402 U.S. 535, 542 (1971) (requiring Georgia to first determine if the individual was liable for the motor accident before it revoked the individual's driver's license); *Morrissey v. Brewer*, 408 U.S. 471, 487–88 (1972) (requiring states to hold a hearing to determine whether the individual violated his parole conditions before it altered the individual's parole status).

Connecticut only disclosed accurate criminal history data. Connecticut designated Respondents as convicted sexual offenders on the website because a criminal court convicted them of a sexual offense. (J.A. 82.) Connecticut did not make a discretionary judgment to affix the label of convicted sex offender on Respondents as was the case in *Constantineau*. (J.A. 82.) Connecticut did not attach a false label to Respondents because the label derives from their accurate criminal histories.

2. The Connecticut sex offender registry website disclosed public criminal history information and did not single out any particular sex offender as currently dangerous.

The sex offender registry did not disclose any individualized message of danger. The meaning of a communication is "that which the recipient correctly, or mistakenly but reasonably, understands [the communication] intended to express." *Restatement (Second) of Torts* § 563. The Connecticut sex offender website contained a statement that the CDPS had not determined that any individual included in the registry was currently dangerous. (J.A. 83.) The website also stated that its purpose was to allow members of the public to easily access the public information, and not to warn that any particular individuals were dangerous. (J.A. 83.) In light

of these statements, it was not reasonable for the public to believe that all of the individuals listed were dangerous, and the website did not single out any individual as a particular danger.

Defamation requires that the recipient of the defamatory matter understands the matter applies to a particular individual. *See Restatement (Second) of Torts* §564A (1977). For this reason, an individual does not defame anyone where the message sent regards a large group of people. *Id.* The Restatement (Second) of Torts provides that defamation requires that (1) the group is small enough that the recipient can reasonably understand the matter to refer to a particular individual, or (2) the circumstances reasonably conclude that the matter refers to a particular individual. *Id.* A publisher does not defame a particular individual when it publishes defamatory statements regarding a large group. *Id.*

Connecticut did not defame the sex offenders even if it implied that they are dangerous because the sex offender registry contains a large number of people. As of April 2001, the Connecticut registry website listed 2,030 individuals as convicted sex offenders. U.S. Dept. of Justice, *Summary of State Sex Offender Registries*, p. 14 <http://www.ojp.usdoj.gov/bjs/pub/pdf/sssor 01st.pdf> (last updated Mar. 29, 2002). The website did not contain any statement that any particular individual was currently dangerous and there were no other circumstances that suggested any particular individual was more dangerous. (J.A. 83.) Connecticut did not defame the sex offenders because the registry group was too large to imply that any particular individual was dangerous.

3. Connecticut did not defame the sex offenders because it did not act negligently when it disclosed accurate criminal history information.

This Court held in *Gertz v. Robert Welch, Inc.* that the states may not impose liability without fault for defamation. 418 U.S. 323, 347 (1974). The Restatement (Second) of Torts states that the publisher of information is only liable if he knew the statement was false, acted in

reckless disregard of the falsity, or acted negligently in failing to determine whether the disseminated information is false. *Restatement (Second) of Torts* § 580B. The lowest standard of fault that gives rise to defamation is negligence. *Id.*

Connecticut was not knowing, reckless, or negligent in disclosing the accurate criminal history data. As mentioned previously, a criminal court convicted all of the individuals listed in the Connecticut sex offender registry of one of the four offenses listed in the CT-SORA. (J.A. 82.) Connecticut did not list individuals in the registry who it merely believed committed sexual offenses. (J.A. 82.) Connecticut established the sex offenders' guilt "beyond a reasonable doubt" prior to listing them in the sex offender registry. Additionally, the CDPS had a procedure in place to respond to any protests regarding the accuracy of the information in the registry. (J.A. 30.) For this reason, Connecticut was not at fault as required for defamation.

4. Connecticut did not defame the sex offenders because it had privilege to disclose the accurate criminal history information for the safety of the public.

Connecticut had privilege to disclose the true and accurate criminal history to the public. The Restatement (Second) of Torts provides that a publication is not defamatory if the publisher has privilege to disclose the matter. *Restatement (Second) of Torts* § 558(b). Where the law requires the publication, the publisher has absolute privilege. *Id.* § 592A. Conditional privilege exists where it is necessary to disclose the information to protect the interest of the publisher or the recipient. *Id.* §§ 594, 595. Conditional privilege bars liability for defamation as long as the publisher does not abuse the privilege. *Id.* § 593. Comment (g) to section 595 specifically states that the publisher has privilege if the publication is "made to the person whose life or property is in peril . . . since there is a social justification for reasonable efforts to protect anyone." *Id.* § 595, comment (g).

Connecticut had privilege to disclose the true information to protect the public welfare. The United States legislature enacted the Wetterling Act, which requires the states to disclose to the public information about convicted sex offenders living in their communities. 42 U.S.C. § 14071(e) (2002). In response, Connecticut enacted the CT-SORA, which requires the CDPS to disclose sex offenders' criminal histories. (J.A. 83.) Both the state and federal legislatures concluded that sex offenders continue to pose a risk to society upon their release into the community because of their high rate of recidivism. Connecticut releases this information to allow the individuals living near sex offenders to protect their children in the event that the sex offender plans to re-offend. (J.A. 84.) Connecticut has privilege to publish the information because its sole purpose is to protect vulnerable citizens. Connecticut acted within its police power when it disclosed sex offender information to the public. *Jacobson v. Mass.*, 197 U.S. 11, 25 (1905) ("According to settled principles the police power of a state must . . . embrace, at least, such reasonable regulations . . . as will protect the public health and the public safety.").

B. Connecticut did not alter or impair the sex offenders' legal status when it disclosed the true and accurate information to protect the public.

Even if Connecticut defamed the sex offenders, there is still no protected liberty interest because there was no plus factor. This Court stated in *Paul v. Davis* that the Fourteenth Amendment does not protect "reputation alone, apart from some more tangible interests such as employment." 424 U.S. at 702. The United States Court of Appeals for the Second Circuit stated prior to hearing the present case that the meaning of the plus element is ambiguous. *Valmonte v. Bane*, 18 F.3d 992, 1000 (2d Cir. 1994). This Court explained in *Siegert v. Gilley* that the plus factor requires that the defamation impair a more tangible government benefit, such as government employment, or impose a legal disability, such as the loss of the right to purchase liquor. 500 U.S. at 240.

The sex offenders did not prove that as a result of the defamatory action, they lost government employment or became legally disabled. The sex offenders alleged that the plus factor in this case was the new set of registration duties that if not followed would result in a felony. Connecticut's disclosure of the sex offender registry did not cause this alleged plus factor. The federal and Connecticut laws placed the registration duties on the sex offenders prior to disclosing the accurate criminal history. The minimal burdens placed on the sex offenders were within Connecticut's power as the guardian of public safety. All individuals face the prospect of a felony conviction for breaking a law.

1. The sex offenders, not an act by Connecticut, caused the alleged plus factor because they committed the underlying offense, which subjected them to registration duties.

The defamation by the state must directly cause the occurrence of the plus factor. In *Paul v. Davis*, this Court held that the state must alter or extinguish a right or status previously recognized under state law "as a result of the [defamatory] state action." 424 U.S. at 701. The words "as a result of" indicate that the defamatory state action complained of must actually cause the plus element.

The cause of the alleged plus factor, the duty to register, is the underlying sexual and/or violent crime that the sex offenders committed. The alleged defamation by Connecticut did not cause the registration duties imposed by the CT-SORA. Pursuant to the federal requirements of 42 U.S.C. § 14071 and the CT-SORA, it was the underlying sexual and/or violent offense that was the actual cause of the registration duties. Connecticut enacted the website to allow members of the public to take precautions to prevent tragedies, such as the sexual assault and murder of Megan Kanka. If the sex offenders had not committed the underlying offense, Connecticut would not have required them to register. Connecticut did not cause the alleged plus

factor because it was caused by the sexual and/or violent offense committed by the offenders. The alleged plus factor fails to meet this Court's causation requirement.

2. The alleged plus element did not occur in the course of Connecticut disclosing the information to the public.

The plus element must occur in the course of the stigma. *Siegert*, 500 U.S. at 234. In *Siegert*, the petitioner, a clinical psychologist, agreed to resign from a government position at a hospital after the hospital notified him that it wanted to terminate his employment. *Id.* at 227. After Siegert's new government employer received a defamatory letter from Siegert's former employer, he denied Seigert his credentials. *Id.* at 228. As a result, the new employer turned down Siegert for a certain position. *Id.* This Court held that Siegert had failed to state a claim for a liberty interest violation, because the plus element, impairment of employment prospects, did not occur incidentally with the defamation. *Id.* at 234.

In this case, the alleged plus factor, the registration duties imposed by the CT-SORA, did not occur in the course of the alleged defamation, the public disclosure of the information. According to the CT-SORA, a convicted offender must register within three days after their release into the community. Conn. Gen. Stat. § 54-251 (2001). The CDPS does not use the information to protect the people of the community until after the offender fulfills his registration duties. Although the offender must verify or resubmit information to ensure accuracy, the registration duties do not occur concurrently with the state's release of information. Connecticut only imposes a felony offense on the sex offenders if they breach the registration duties. This element of the plus factor included in the analysis of the Court of Appeals for the Second Circuit also does not occur in the course of Connecticut disclosing the accurate criminal history data.

3. The Connecticut sex offender registry did not cause the loss of government employment for the sex offenders.

This Court has primarily found that a plus element existed in cases where the state terminates the defamed individual's government employment. In *Board of Regents of State Colleges v. Roth*, this Court attempted to define under what circumstances injury to reputation would implicate a liberty interest. 408 U.S. 564, 572–73 (1972). The Respondent in *Roth* asserted a liberty deprivation where his government employer refused to renew his employment contract. *Id.* at 566. This Court recognized that there is a liberty deprivation where there is loss of government employment along with damaging charges to the individual's reputation made by the state. *Id.* at 573. Later, in *Siegert*, this Court held that there was no liberty interest because the public actor did not utter the defamation incident to terminating Siegert's government employment. 500 U.S. at 234. Justice Marshall criticized the majority view that "reputational injury deprives a person of liberty only when combined with loss of present employment, not future employment." *Id.* at 572–73. This Court has seldom found the existence of a plus element outside of the government employment arena.

The sex offenders did not allege the loss of present government employment caused by the stigma. The alleged plus factor, the registration duties, is not similar to the archetypal factor of government employment. This Court recognized employment's importance to the livelihood of an individual and chose to specifically protect the loss of government employment caused by defamation. The duties of registration do not impair the sex offenders' ability to perform any job. The sex offenders have not established a plus factor because the CT-SORA did not cause the loss of government employment or impair a similar tangible interest.

4. Connecticut has the power to impose registration duties on the sex offenders because the duties relate to the legitimate legislative objective to protect the public.

The government has the power to impose regulatory constraints or affirmative duties on the rights protected by the Due Process Clause. *U.S. v. Locke*, 471 U.S. 84, 105 (1985); *See also Jacobson*, 197 U.S. at 26 (noting that the government may subject "persons and property . . . to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state."). In *Locke*, this Court upheld the constitutionality of annual filing requirements that the Federal Land Policy and Management Act of 1976 imposes on holders of unpatented mining claims. *Id.* at 109–10. The Act requires claim holders to register their claims initially and every subsequent year with the Bureau of Land Management. *Id.* at 88. Claim holders' failure to file the required information results in forfeiture of their property rights. *Id.* at 86. This Court emphasized that where the duties propose to further legitimate legislative objectives, the legislature acts within its power. *Id.* at 104. The legislature does not have to enact the most desirable way to meet the legislative objective, but only a rational way. *Id.* at 109.

In this case, the registration requirements for sexual offenders resemble those upheld in *Locke*, and the legislature has an even more compelling objective furthered by the sex offender registration duties. The vested property rights examined in *Locke* are similar to the liberty interest examined in this case because the Fourteenth Amendment protects both. The CT-SORA requires convicted sex offenders to provide certain information shortly after their release into the community, and requires them to verify the information to ensure accuracy. (J.A. 82.) Failure to complete the requirements may result in imprisonment. (J.A. 83.) This is similar to the act upheld in *Locke* because failure to submit the required information in that case resulted in a loss of property rights. The Connecticut legislature has a legitimate objective to provide the public

the opportunity to protect their children from convicted sex offenders who live in their communities. The public disclosure of information via a website is a rational scheme for meeting this objective because it effectively provides the needed information to members of the community. According to the holding in *Locke*, the Connecticut legislature has the power to enact the registration duties, which are therefore not a plus factor for purposes of the "defamation-plus" test.

The sex offenders' legal status is the same as all other individuals. Connecticut requires them to register because they committed one of the offenses listed in the CT-SORA. Failure to complete their duty to register results in a class D felony. (J.A. 83.) This Court may consider the untiered system and the felony charge for failing to complete the registration duties harsh, but the legislature has the power to enact harsh legislation. *See Harmelin v. Mich.*, 501 U.S. 957 (1991) (holding that a Michigan statute that allowed life imprisonment for cocaine possessors was constitutional). Like the sex offenders, any individual that breaks a law is subject to the penalty provided by the legislature.

C. An additional hearing would serve no purpose because of the difficulty in predicting recidivism, the low risk of erroneous deprivation, and the compelling state interest.

The circumstances do not require procedural due process because Connecticut did not deprive the sex offenders of a protected liberty interest. *Roth*, 408 U.S. at 569. If this Court finds, however, that a protected liberty interest exists, the circumstances still do not warrant a hearing. This Court examines three factors to determine what process is due: (1) the private interest the state affects, (2) the risk of an erroneous deprivation of the private interest and the probable value of additional safeguards, and (3) the government's interest, including the administrative burden. *Mathews v. Eldridge*, 424 U.S. 319, 334–35. (1976). This Court balances

these factors to determine "when, under our constitutional system, [it must impose] judicial-type procedures." *Mathews*, 424 U.S. at 348.

The sole private interest asserted is the alleged liberty interest of the sex offenders required to register. Connecticut does not risk erroneous deprivation because a criminal court convicted all the sex offenders of a sexual and/or violent crime in a criminal proceeding. (J.A. 82.) All offenders included in the registry plead guilty, plead nolo contendere, or a jury or court found them guilty. Conn. Gen. Stat. § 54-251. The standard of proof required to convict a person in a criminal proceeding is "beyond a reasonable doubt," which is a higher standard than administrative hearings. Additionally, Connecticut has a procedure in place to respond to challenges of the accuracy of the registry information. (J.A. 30.)

An administrative hearing would have no value because it is impossible to predict which offenders will recidivate. Sex offenders are more likely to re-offend with sex and/or violent crimes than other repeat offenders. *Doe v. Poritz*, 142 N.J. 1, 17 (1995). The propensity to commit another sexual crime does not go away with time. *Id.* The statistical evidence suggests that child sexual offenders especially are serial offenders. James A. Billings & Crystal L. Bulges, *Maine's Sex Offender Registration and Notification Act: Wise or Wicked?*, 52 Me. L. Rev. 175, 186 (2000). One study concluded that the "behavior [of sexual offenders] is highly repetitive, to the point of compulsion" after the study found that 74% of imprisoned child sex offenders had one or more prior conviction. *Id.* A National Institute of Mental Health study determined that the typical child sexual offender molests 117 children, most of whom do not report the offense. *Id.* at n. 84. The average number of victims for a molester of young boys is even higher at 281 children per offender. *Id.* Further, successful treatment of sex offenders is rare. *Poritz*, 142 N.J. at 17. With rates of recidivism this high and the result of re-offense so

damaging to the child victims, it is better to err on the side of our children. A hearing would serve no value in determining which of the released sexual offenders may recidivate.

Connecticut, as guardian of the public safety, has a strong interest in protecting children from sexual abuse and violent crime. *See Santosky v. Kramer*, 455 U.S. 746, 766 (1982). Sex offender registry acts represent a determination by the legislature that society has a right to know of the presence of sexual offenders in their communities to allow people to protect themselves and their children. *Poritz*, 142 N.J. at 13. The sex offender registry acts also represent a conclusion, based on statistical data, that re-offense by sexual offenders is a serious risk. *Id.*

The sheer number of sexual crimes represents a need for Connecticut to protect its citizens from sexual offenders. Although many people do not report sexual crimes, the available data demonstrates the large scale of the problem. *Id.* at 16. The United States Justice Department indicates that each year in the United States about 133,000 women age twelve or older fall victim to rape or attempted rape. *Id.* Additionally, the Justice Department estimates from police reports that offenders raped around 17,000 girls under the age of twelve in 1992. *Id.*

Sexual crimes against children leave a lasting scar on the victims as well as society. Adults molested as children are more prone to develop psychosocial problems, including chronic depression and anxiety, substance abuse, suicidal behavior, and involvement in sexually or physically abusive relationships. *Id.* Child sexual abuse often unleashes a chain where the victims become the aggressors against their own children. *Id.* Studies show a close link between adult male aggressive behavior and childhood sexual abuse. *Id.* All of these problems connected to sexual abuse take a toll on society in the form of the fiscal burden of treatment, and the continuing spiral of sexual crime that takes tomorrow's children as its victims. Connecticut's

interest in lessening sexual crime is greater than the private interests of convicted sex offenders because of the personal trauma and societal damage caused by sexual crimes.

To require a pre-registration hearing would impose a great administrative and fiscal burden on Connecticut. The government's interest in conserving scarce monetary resources is a factor considered in determining what process is due. *Mathews*, 424 U.S. at 348. This Court emphasized in *Mathews* that "[a]t some point [the cost may outweigh] the benefit of an additional safeguard to the individual affected by the administrative action." *Id.* Connecticut's scarce resources should go to protecting the children of communities where convicted sexual offenders reside, and not to a superfluous hearing.

The factors in this case weigh against additional procedural safeguards. A criminal court convicted the sex offenders subject to registration in criminal proceedings, which established their guilt beyond a reasonable doubt. Connecticut has a strong interest to protect the children in communities where a convicted offender resides and to conserve scarce fiscal resources. These interests outweigh the sex offenders' alleged liberty interest. Even more compelling, a pre-registration hearing would serve no purpose because it is impossible to predict who will re-offend.

II. THE MEASURES USED BY THE ALASKA SEX OFFENDER REGISTRY TO COLLECT AND DISCLOSE INFORMATION FALL OUTSIDE THE EX POST FACTO CLAUSE BECAUSE THEY MAP THE LEGISLATURE'S REGULATORY INTENT TO PROTECT THE PUBLIC.

ASORA is not an ex post facto law because it does not retroactively punish sex offenders ASORA requires sex offenders to simply register with local authorities and allows Alaska to passively disclose the registry information to concerned members of the public. On its face, the Alaska statute evidences its civil, non-punitive nature. Neither the language of the statute nor its placement indicates a criminal nature. The legislative findings that precede ASORA spell out

the Alaska legislature's intent to help the public protect itself and to help police agencies apprehend sex offenders, not to disadvantage sex offenders.

The Court of Appeals for the Ninth Circuit concluded that the legislative intent of ASORA is non-punitive. *Doe v. Otte*, 259 F.3d 979, 986 (9th Cir. 2001). The court considered whether Respondents proved that ASORA so punishes sex offenders that it is criminal in effect despite the legislature's civil intent. *Id.* at 994. The court applied the *Kennedy* seven-factor balancing test and held that ASORA punishes sex offenders and therefore violates the Ex Post Facto Clause. *Id.* In particular, the court held that ASORA proves excessive because Alaska publishes public information about sex offenders on the Internet. *Id.*

The Ninth Circuit gave too much weight to a single feature of ASORA—how Alaska discloses information on the Internet—and too much weight to a single factor of the seven-part *Kennedy* test—whether ASORA's measures are excessive in light of the legislature's intent to protect Alaskan citizens. The sex offenders have not come forward with the "clearest proof" of ASORA's criminal effects, which this Court requires to overcome the legislature's stated purpose for ASORA. *U.S. v. Ward*, 448 U.S. 242, 248 (1980). This Court recognizes that the choice among reasonable policy alternatives remains with the government officials who have unique understanding of, and responsibility for, limited public resources. *Mich. Dept. of St. Police v. Sitz*, 496 U.S. 444, 453–54 (1990). The Ninth Circuit imposed its own ideals on the disclosure system instead of strictly judging whether ASORA is excessive in light of the Alaska legislature's intent to protect its citizens.

De novo review of the Ninth Circuit's opinion begins with what it means to retroactively punish people. The U.S. Constitution prohibits ex post facto laws. U.S. Const. art. I, § 10, cl. 1. The clause has two purposes. *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981). First, individuals

receive fair warning about the effects of the laws that govern them. *Weaver*, 450 U.S. at 28–29. Second, the clause provides a judicial check against state legislatures that pass arbitrary and vindictive laws. *Id.*

Alaska denies sex offenders fair notice and the legislation is vindictive only if ASORA punishes offenders more than the law allowed when the offenders committed the sex crimes. *Id.* ASORA does not punish offenders more or change the terms of the offenses, and the act does not violate the Ex Post Facto Clause.

This Court has established a two-part test to determine when a law is civil. *Ward*, 448 U.S. at 248; *Hudson v. U.S.*, 522 U.S. 93, 99 (1997); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963). First, this Court asks whether the legislature intended a civil law, either expressly or implicitly. *Ward*, 448 U.S. at 248. Second, this Court decides whether the movant has shown the "clearest proof" that the law is so punitive in effect that it overrides the legislature's civil intent. *Id.* at 249.

A. ASORA is a civil law because it collects and discloses details about sex offenders' residences and workplaces to help the public protect itself, not to punish offenders.

Courts decide whether a law is civil based on the face of the statute and the legislative process behind it. *Ward*, 448 U.S. at 248; *Kennedy*, 372 U.S. at 169. If the legislature labels a statute as "civil," that ends the inquiry. *Ward*, 448 U.S. at 248. Otherwise, courts look to whether the legislature implied a civil intent. *Id.*

This Court has looked extensively to the legislative debates behind a statute to determine whether Congress intended to punish individuals. *Kennedy*, 372 U.S. at 171–85. In *Kennedy*, the congressional debates revealed that both the opponents and the proponents of the statutory language spoke of the purpose of the bill as a "'penalty' and 'punishment' for a 'crime' and an

'offense' and a 'violation' of 'criminal law.'" *Kennedy*, 372 U.S. at 174. This Court decided that the legislature's intent to punish individuals was clear through these debates. *Id.* at 169. Here, the Alaska legislature did not label the acts as criminal or civil, so the inquiry is whether the legislature implied one or the other.

The legal codes under which the legislature placed ASORA indicates administrative preference rather than whether the law is civil or criminal. The Alaska legislature placed the laws that require offenders to register in the criminal procedure code and the laws that require Alaska to disclose public information in the civil administration code. Alaska Stat. §§ 12.63.010, 18.65.087 (2001). The legislature placed the registration laws in the criminal procedure code for administrative convenience because they apply to persons who have committed sex offenses. Alaska Stat. § 12.63.010. The criminal procedure code includes several statutes that are civil in nature, such as how Alaska appoints medical examiners and fingerprints individuals. Alaska Stat. §§ 12.65.015, 12.80.060 (2001). The legislature placed the ASORA provisions for administrative convenience, not to signal whether the laws are civil or criminal.

The structure of ASORA reveals the civil intent of the legislature. The law requires sex offenders to do no more than supply basic information to the Department of Corrections at regular intervals. Alaska Stat. § 12.63.010. The Department of Corrections must provide this public information to law enforcement officers and those in the public who seek out the information. Alaska Stat. § 18.65.087.

The structure of ASORA maps the civil intent of Alaska's lawmakers. The legislative findings that appear at the beginning of ASORA plainly state the purpose of the statute. The Alaska legislature intended to protect the public from sex offenders through the release of public information. Alaska H. 69, 18th Leg., 2d Sess. § 1 (May 12, 1994). ASORA effectuates this

goal when it releases certain information about sex offenders to police agencies and interested members of the public. Alaska H. 69, 18th Leg., 2d Sess. at § 1. The legislature recognized the privacy interests of sex offenders, but concluded that they are less important here than Alaska's need to protect its citizens. *Id.* The legislature decided that the provisions could lawfully impinge on sex offenders' privacy rights without punishing the sex offenders. *Id.* The structure of ASORA evidences the intent of the Alaska's legislature to regulate but not punish offenders.

The legislature made the Alaska sex offender registry a regulatory mechanism to collect and disclose sex offender information for public safety. The sex offenders claim that ASORA is so punitive in effect that it overrides the legislature's civil intent. This Court applies the seven-factor *Kennedy* test to decide whether the sex offenders have shown the "clearest proof" that the law punishes offenders. *Kennedy*, 372 U.S. at 169; *Ward*, 448 U.S. at 248.

B. ASORA is a civil law in effect because the seven-factor *Kennedy* test shows that the law regulates rather than punishes sex offenders and that ASORA's measures rationally and proportionately relate to public safety.

This Court has instructed lower courts to apply a seven-factor test to determine whether an act of the legislature is civil or criminal in effect. *Kennedy*, 372 U.S. at 169. ASORA (1) does not impose an affirmative disability or restraint; (2) does not impose a sanction that is viewed historically as a punishment; (3) does not attach based on knowledge of wrongdoing; (4) does not promote retribution and deterrence; (5) does not apply to criminal behavior; (6) rationally relates to a public safety purpose; and (7) proves not excessive in relation to the public safety purpose. *Id.* at 168–69.

All of the factors are relevant and may point in different directions, and no one factor controls the outcome. *Hudson*, 522 U.S. at 101. Courts do not need to examine all seven factors, as evidenced in *Hudson*, where this Court only considered the five factors more applicable to the statute. *Id.* at 104–05. Courts evaluate a statute by the totality of the circumstances and decide

whether the movants produce the "clearest proof" that the statute punishes offenders in fact. *Hudson*, 522 U.S. at 105.

The *Kennedy* factors test applies to ASORA on its face. 372 U.S. at 169. For example, this Court examined whether the sanction in *Hudson* came into play only on the basis of scienter and found that the statute on its face penalized violators, without regard to the violator's state of mind. 522 U.S. at 104. This Court limits itself to the express language of the statute to determine whether a penalty is criminal in nature. *Id.* The seven *Kennedy* factors add up to show here that ASORA is civil in effect.

1. ASORA does not disable or restrain sex offenders.

The Alaska statute does not disable or restrain sex offenders because it simply requires sex offenders to submit information at regular intervals. Although this Court has not defined the terms affirmative disability or restraint, this Court in *Hudson* interprets the terms to involve the "'infamous punishment' of imprisonment." 522 U.S. at 104. In *Hudson*, the sanctioned offenders could not subsequently participate in their profession, the banking industry, and this Court found the sanction far short of an affirmative disability or restraint. *Id.*

Here, the requirement that sex offenders visit a local authority at specified intervals and update their contact and employment information does not restrain offenders. Alaska Stat. § 12.63.010. Sex offenders may move and travel freely. *Id.* ASORA provides the public with information on where the sex offenders work, but that alone does not disable or restrain their employment opportunities. The sex offenders may work where they wish. If employers discriminate against sex offenders on the basis of their previous offenses and/or their presence on the registration lists, appropriate employment laws exist to address the individuals who hire or fire discriminatorily. *See* 2-28 Larson on Employment Discrimination § 28.05 (2001) (noting

that courts favor a plaintiff when an employer refuses to hire, or fires, an individual based on prior criminal convictions, unless the previous criminal acts directly apply to the job duties).

2. The information ASORA collects and discloses to protect its citizens is not historically viewed as punishment.

Among the seven factors, the historical view factor applies less here. This Court's historical view of punishment sanctions does not extend to the duty of sex offenders to register and Alaska's power to disclose public information. The Alaska government's action to collect and disclose public information compares to the historical rights and duties of individuals to disclose public information under other laws, which the court system encourages or even mandates.

The United States legal system does not allow anonymity: the government publicly indicts and tries defendants, the media covers trials, and legal procedure rules require the use of one's own name in a claim. *See e.g.* Fed. R. Civ. P. 17(a) (2001). Local authorities and concerned citizens could otherwise obtain, through public records, the information that ASORA provides on listed sex offenders. The Alaska statute allows the passive disclosure of public information, which is not historically viewed as punishment.

3. ASORA requires sex offenders to register and Alaska to disclose public information regardless of knowledge of wrongdoing.

On its face, the Alaska statute applies to all sex offenders, without regard to knowledge. In *Hudson*, an agency could assess penalties against any person who violated the statute, without regard to the violator's state of mind. 522 U.S. at 104. Since the sanction came into play whether or not a court found scienter, this Court decided that the third *Kennedy* factor suggested that the law did not punish offenders, but rather regulated them.

Here, the Alaska statute blankets all sex offenders. Alaska Stat. § 12.63.010. To evaluate the convictions that label someone a sex offender for the purposes of ASORA would violate the rule that courts test a statute on its face. *Hudson*, 522 U.S. at 104. Even if this Court looks to the underlying crimes of the sex offenders, some apply without any mens rea. Alaska Stat. § 12.63.100 (2001). As ASORA uses the term, sex offense includes acts with minors that are illegal whether or not the offender knows the minor's age, and also includes convicts who plead nolo contendere and who the jury acquitted by reason of mental illness. *Id.* This third *Kennedy* factor also points toward a non-punitive effect.

4. ASORA promotes public safety, not the traditional aims of punishment—retribution and deterrence.

The Alaska legislature passed ASORA to promote public safety, not to punish or deter sex offenders. Alaska H. 69, 18th Leg., 2d Sess. § 1. Courts examine all of the elements already addressed by the other six *Kennedy* factors to decide whether a statute involves retribution, or punishment. *Kan. v. Hendricks*, 521 U.S. 346, 362–66 (1997).

In *Hendricks*, this Court analyzed the other six factors to decide whether a statute that subjects a person to non-indefinite confinement serves as retribution. *Id.* at 365–66. The *Hendricks* statute allowed the government to confine sexually violent predators past their scheduled release from prison. *Id.* at 352. This Court decided that the *Hendricks* statute was not retributive because the government used the conviction record to serve as evidence rather than to affix culpability. In *Allen v. Illinois*, this Court found a statute non-punitive even though it was applied based on an offender's sexual crime because Illinois used the prior criminal conduct primarily to predict future behavior. 478 U.S. 364, 371 (1986).

Here, the Alaska statute uses sex offenders' prior convictions as information to help protect the public, not as an indication of present culpability. ASORA focuses on the offenders'

prior crimes as grounds for possible recidivism. Alaska H. 69, 18th Leg., 2d Sess. § 1. ASORA's civil use of the criminal history evidences the non-retributive nature of the statute.

In *Hendricks*, this Court decided that the legislature did not intend the statute to deter wrongdoers and the Court doubted that the statute even could deter people. 521 U.S. at 362–63. This Court reasoned that the statute only affected people who suffer from mental abnormalities that deprive them of control over their behavior, and it is unlikely that the threat of confinement deters such persons. *Id.*

The Alaska legislature structured ASORA to inform the public and the police, not to deter recidivism. ASORA provides information for the public to protect themselves and the police to apprehend recidivists. Alaska H. 69, 18th Leg., 2d Sess. § 1. ASORA's actual ability to affect recidivism rates is questionable. Even if ASORA allows law enforcement agents to apprehend sexual offenders more effectively or more quickly than before, the statute is not likely to deter offenders. If potential prison sentences fail to deter prospective offenders, they are not likely to reconsider based on the threat of the registration and disclosure requirements.

5. ASORA applies to an offender's status, not to behavior that is already a crime.

ASORA applies to sex offenders who gain release from prison and re-enter the community, and ASORA does not apply to their behavior after release, unless they fail to register. Alaska Stat. § 12.63.010. If this Court looks at the underlying behavior that leads to the sex offender status, then ASORA applies to criminal behavior. *Id.* This fifth *Kennedy* factor cuts both ways, depending on whether this Court looks to the status or the underlying crime as the basis on which ASORA applies to offenders.

6. ASORA rationally relates to a non-punitive purpose because the legislature enacted ASORA to protect the public.

Parents use the ASORA information to remain on guard for sex offenders' suspicious behavior toward their children. Police agencies use the information to update the databases that help them apprehend re-offenders. Sex offender registration acts with these two functions help protect the public. Alaska H. 69, 18th Leg., 2d Sess. § 1. After a repeat sex offender who lived next door to seven-year-old Megan Kanka brutally murdered her, the New Jersey legislature enacted the first "Megan's Law." *Doe v. Dept. of Pub. Safety*, 271 F.3d 38, 41 (2d Cir. 2001). The federal government recognized the tremendous threat to all states because sex offenders re-offend at a high rate and encouraged all states to collect and disclose information about resident sex offenders to help the public help themselves. *Id.* Alaska, along with all the other states, tailored a system to collect and disclose sex offender information that suits the Alaska public's and law enforcement agencies' needs. *Id.*

The Alaska legislature's design to protect its citizens connects to the tangible effects of ASORA. First, ASORA allows concerned parents to access information about sex offenders in their neighborhood and to make more informed decisions on how to protect their children. Alaska Stat. § 18.65.087. Second, ASORA prepares law enforcement agencies with more accurate information about sex offenders to help police apprehend re-offenders. *Id.* ASORA's features give effect to the legislature's intent to protect the public.

7. ASORA's features, which allow Alaska to collect and disclose public information, are not excessive because they rationally and proportionately relate to the legislature's goal to protect the public and Alaska's uniquely high rate of sex offenses.

If ASORA appears to take more excessive steps to collect and disclose sex offender information it is because Alaska faces a crisis unseen in any other state. Alaska has one of the

highest rates of child sexual abuse in the nation and one-quarter of its prison population committed sex offenses. (J.A. 212.) Other states have chosen other methods to collect and disclose sex offender information. New York, for example, ranks recidivism threat levels and uses a tiered system to decide the amount of sex offender information that New York discloses to the public. NY Correct. Law § 168 (McKinney 2002). The forty-nine other states face different sex offense rates than New York, and different budgetary constraints and law enforcement capabilities. What works for New York's Megan's Law is not necessarily right for any other state.

ASORA falls far below an "excessive" point because the legislature narrowly tailored the statute to protect the public. As explained with the sixth *Kennedy* factor, sex offenders pose a tremendous threat to the public because they re-offend in high rates. Alaska H. 69, 18th Leg., 2d Sess. § 1. ASORA provides parents and authorities with accurate public information that helps Alaskans protect themselves and others. Alaska Stat. § 18.65.087.

The possibility that the Internet feature of ASORA exposes sex offenders to worldwide ostracism preoccupies the Ninth Circuit in the opinion below. *Otte*, 259 F.3d at 994. The advantages of ASORA's Internet access far outweigh the Ninth Circuit's concern. The Internet is the most effective tool to provide concerned parents with local sex offenders' identities, residences, and workplaces, which allows parents to monitor their children's interactions with possibly dangerous sex offenders. Without the ASORA disclosure system, Alaska's parents cannot take the easy steps afforded by ASORA to monitor their children's relationships with known offenders. The ASORA Internet feature streamlines the disclosure process and provides more accurate and timely information to parents about sex offenders in their neighborhood.

ASORA differentiates among sex offenders as to the severity of their past crimes and tiers the length of time for which sex offenders must register. Alaska Stat. § 12.63.010(d). For the assigned length of time, ASORA simply requires sex offenders to provide public information on a periodic basis. Alaska Stat. § 12.63.010. ASORA passively discloses the public information to concerned citizens who choose to access the site. Alaska Stat. § 18.65.087. The methods ASORA uses to collect and disclose sex offender information are not excessive in light of the legislature's important and legitimate intent to protect the public.

C. The sex offenders fail to carry their burden of the "clearest proof" that ASORA so punishes sex offenders that this Court should override the Alaska legislature's intent to protect its citizens.

An override of the civil intent of the legislature requires the "clearest proof" that ASORA so punishes sex offenders in purpose or effect that this Court should declare it unconstitutional. *Ward*, 448 U.S. at 249. The seven factors of the *Kennedy* test evidence that ASORA is civil in purpose and effect: ASORA does not disable, restrain, or punish offenders; it does not attach only on the basis of scienter or criminal behavior; and it rationally and proportionately relates to the legislature's goal to help the public protect itself.

No set number of *Kennedy* factors equals the "clearest proof" of a criminal law, but case law establishes that it is a heavy burden of proof. *Hendricks*, 521 U.S. at 361. This Court looked at five of the *Kennedy* factors in *Hudson* and found that, even though some of the factors cut both ways, the movant failed to show that the monetary penalties and debarment sanctions acted as criminal laws. *Hudson*, 522 U.S. at 105. The *Hudson* Court showed how the *Kennedy* factors could cut both ways but still prevail as civil. *Id.* For example, a statute may act as a deterrent and yet serve as an effective regulatory, thus civil, statute. *Id.* Here, the factors all tend toward a civil nature. Even if this Court finds that a few of the factors cut toward a criminal nature, the

sex offenders fail to show the "clearest proof" required by the *Ward* test. 448 U.S. at 249. ASORA's methods to collect and disclose sex offender information are civil in nature and do not violate the Ex Post Facto Clause of the U.S. Constitution.

The Ninth Circuit struck down the entire ASORA system because it held that ASORA punishes sex offenders excessively in relation to the public safety goal. *Otte*, 259 F.3d at 986. In essence, the Ninth Circuit only decided that the disclosure mechanism punishes sex offenders. *Id.* The Ninth Circuit concluded that only the disclosure provision is unconstitutional.

Alaska statute 01.10.030 states that all laws enacted by the legislature that do not contain a severability clause shall be construed as though they contained one. Alaska Stat. § 01.10.030 (2001). This Court should read the following language into ASORA: "If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby." *Id.*

If this Court agrees with the Ninth Circuit, despite the evidence of ASORA's regulatory effect that controls the *Kennedy* test and compels a non-punitive conclusion, this Court should reverse the Ninth Circuit in part, and only declare the disclosure provision unconstitutional. The Alaska legislature deserves the opportunity to refashion a disclosure provision that fits within their needs and the holding of this Court. The ASORA registration system remains good law even if the disclosure system is held unconstitutional.

III. THIS COURT SHOULD DEFER TO ALASKA AND CONNECTICUT'S REASONABLE LEGISLATION BECAUSE THE STATES MUST PROTECT THEIR CITIZENS FROM UNPREDICTABLE RECIDIVISM AND THEIR SEX OFFENDER REGISTRIES DO NO MORE THAN ALLOW PEOPLE TO PROTECT THEMSELVES.

This country faces a devastating problem: states are unable to prevent thousands of cases of sex abuse and need more resources to apprehend sex offenders. Sexual crimes leave the victims prone to depression, anxiety, substance abuse, suicidal behavior, and involvement in

sexually or physically abusive relationships. *Doe v. Poritz*, 142 N.J. 1, 13 (1995). Sex offender registries with public Internet access combat this problem because they allow parents to keep their children out of harm's way. Parents can look at the website, identify sex offenders in their neighborhood, and ensure that their children are not put in an inappropriate situation with the sex offenders. The Alaska and Connecticut website registries, like those of all other states, breed safety, not stigmatization.

Alaska and Connecticut adapted the basic framework of the federally endorsed Megan's Law and tailored it to their own needs. The Alaska and Connecticut legislatures are in the best position to decide what type of notification system fits their state budgets and their public safety needs. *Mich. Dept. of St. Police v. Sitz*, 496 U.S. 444, 453–54 (1990). Courts should review legislation to safeguard the basic legal rights of citizens, but not to impose policy. *Id.* State governments understand local problems and policy constraints and have the right to decide which rational policy alternative best serves the public's interest.

This Court has held that "courts should pay particular deference to reasonable legislative judgments" where the issue involves an area that is scientifically uncertain. *Jones v. U.S.*, 463 U.S. 354, 365 (1983). In *Jones*, this Court upheld a D.C. statute that requires the district to commit individuals that a criminal court acquitted by reason of mental insanity to a mental institute until they can prove they no longer pose a danger to society, even if it is longer than the maximum sentence for the crime. *Id.* at 356–60. This Court upheld the statute as constitutional because the "present state of mental knowledge and therapy regarding mental disease . . . has not reached finality of judgment." *Id.* at 365. For this reason, this Court deferred to the legislature's reasonable judgment to protect society. *Id. See also Marshall v. U.S.*, 414 U.S. 417, 427 (1974) ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties,

legislative options should be especially broad and courts should be cautious not to rewrite legislation."); *Jacobson v. Mass.*, 197 U.S. 11, 25 (1905) ("[T]he police power of a State must . . . embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety.")

The federal and state legislatures learned from experience that there is no foolproof method to determine which sex offenders will re-offend. As a group, sex offenders are more likely than other offenders to re-offend with sexual and/or violent crimes. *Poritz*, 142 N.J. 1, 16–17 (1995). This tendency to re-offend does not decrease over time. *Id.* at 17. Similar to the problem of mental illness addressed in *Jones*, current knowledge on sex offender recidivism has not reached finality of judgment. In light of the high rates of recidivism, the Connecticut and Alaska legislatures enacted sex offender registry acts to allow parents to protect their children. In accordance with the *Jones* holding, this Court should defer to the legislatures' reasonable decisions in this area. The legislatures should enjoy broad options to combat a problem that devastates the many victims of sexual offenses, their families, and the very core of society. The Constitution should not prevent society from protecting itself against the potential re-offense of those most feared crimes, and those crimes that victimize the most vulnerable and defenseless—the children of society.

CONCLUSION

Connecticut did not deprive the convicted offenders listed in the sex offender registry of a protected liberty interest because it did not defame the sex offenders when it disclosed true and accurate criminal histories. Connecticut did not alter or impair the sex offenders' legal status because the underlying offenses that the sex offenders committed caused the alleged plus factor. Connecticut has a strong interest to protect the public from the risk of re-offense by convicted

sex offenders and to conserve its scarce financial resources. These factors weigh against requiring Connecticut to hold a hearing that would have no benefit. Petitioners respectfully request that this Court REVERSE the judgment of the United States Court of Appeals for the Second Circuit on the due process claim.

ASORA collects and discloses details about sex offenders to help the public protect itself, not to punish offenders. The effect of the statute is non-punitive because it does not disable or restrain offenders, it does not serve the traditional goals of punishment, and it rationally and narrowly relates to the purpose of helping the public help itself. Given that ASORA does not increase the punishment for sex offenses committed prior to the statute's enactment, there is no ex post facto violation. Petitioner respectfully requests that this Court REVERSE the judgment of the United States Court of Appeals for the Ninth Circuit on the ex post facto claim.

Respectfully submitted,

Kimberly Owens

Leah Scholer

Counsel for Petitioners